(G-129)

In The

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-595

ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York, *Appellants*,

and

HORACE MANN-BARNARD SCHOOL, LA SALLE ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL, and ST. MICHAEL SCHOOL, *Appellants*,

and

YESHIVAH RAMBAM, *Appellant*,

— *against* —

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON, *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION ON BEHALF OF APPELLANTS LEVITT and NYQUIST

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The appellants Arthur Levitt and Ewald B. Nyquist, pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, file this statement of the basis upon which it is contended that the Supreme Court of the United States has

jurisdiction on direct appeal to review the final judgment in question, and should exercise such jurisdiction in this case.

Opinion Below

The opinion of the Judges in this case, sitting as a statutory Court of three Judges, written by the HON. ROBERT J. WARD, Judge of the United States District Court for the Southern District of New York, and concurred in by HON. WALTER R. MANSFIELD, Associate Judge of the United States Court of Appeals for the Second Circuit, and HON. MORRIS LASKER, Judge of the United States District Court for the Southern District of New York, sustained the complaint; held Chapter 507 of the New York Laws of 1974, as amended by Chapter 508 of the Laws of 1974; to be unconstitutional, and enjoined the further implementation of the statute by the defendants Levitt and Nyquist for the benefit of sectarian schools. The opinion and the final judgment appealed from are set out in the Appendix hereto and marked as Appendix "A" and "B" respectively. There is as yet no citation to this opinion.

Jurisdiction

The appeal herein is from a final judgment made and entered in the United States District Court for the Southern District of New York by a specially constituted three-judge panel convened therein and 28 United States Code, Sections 2281 and 2284. The judgment holds Chapter 507 of the New York Laws of 1974, as amended by Chapter 508 of the Laws of 1974, to be unconstitutional on the ground that it violates the Establishment Clause of the First Amendment to the Constitution of the United States to the extent that the statute authorizes the allocation of funds to sectarian schools, and enjoins the defendants Levitt and Nyquist from making payments under those Chapters to such sectarian schools.

The complaint sought declaratory and injunctive relief against Chapters 507 and 508, alleging that the statute violated the Establishment Clause by providing payments to nonpublic schools in the State as reimbursement to the schools of the actual cost of providing specified testing and record keeping services to the State, as required by State law or regulation, and further alleging that the statute violated the Free Exercise Clause in that the statute constitutes compulsory taxation for the support of religion and religious schools.

The final judgment granting the relief sought in the complaint was made and entered July 28, 1976. Notice of Appeal on behalf of defendants Levitt and Nyquist was filed on September 2, 1976, in the United States Supreme Court for the Southern District of New York (a copy of which is made Appendix "C" hereto). Notices of Appeal were also filed on behalf of intervenor-defendants Horace Mann-Barnard School, LaSalle Academy, Long Island Lutheran High School and St. Michael School on September 22, 1976 and by intervenor-defendant Yeshivah Rambam on September 21, 1976.

The Supreme Court of the United States has jurisdiction to review by direct appeal the final judgment above-cited pursuant to the terms of 28 United States Code, Sec. 1253.

The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Flast* v. *Cohen*, 392 U.S. 83 (1968); *Board of Education* v. *Allen*, 392 U.S. 236 (1968); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); *Tilton* v. *Richardson*, 403 U.S. 672 (1971); *Levitt* v. *Committee for Public Education and Religious Liberty*, 413 U.S. 473 (1973); and *Meek* v. *Pittinger*, 421 U.S. 349 (1975).

Statute Involved

Chapter 507 of the New York Laws of 1974, provides as follows in pertinent part (the full text is set out as Appendix "D" hereto):

"Section 1. Legislative findings. The legislature hereby finds and declares that:

"The state has the responsibility to provide educational opportunity of a quality which will prepare its citizens for the challenges of American life in the last decades of the twentieth century.

"To fulfill this responsibility, the state has the duty and authority to evaluate, through a system of uniform state testing and reporting procedures, the quality and effectiveness of instruction to assure that those who are attending instruction, as required by law, are being adequately educated within their individual capabilities.

"In public schools these fundamental objectives are accomplished in part through state financial assistance to local school districts.

"More than seven hundred thousand pupils in the state comply with the compulsory education law by attending nonpublic schools. It is a matter of state duty and concern that such nonpublic schools be reimbursed for the actual costs which they incur in providing services to the state which they are required by law to render in connection with the state's responsibility for reporting, testing and evaluating.

* * *

"Sec. 3. Apportionment. The commissioner shall annually apportion to each qualifying school, for school years beginning on and after July first, nineteen hundred seventy-four, an amount equal to the actual cost incurred by each such school during the preceding school year for providing services required by law to be rendered to the state in compliance with the requirements of the state's pupil evaluation program, the basic educational data system, regents examinations, the statewide evaluation plan, the uniform procedure for pupil attendance reporting, and other similar state prepared examinations and reporting procedures.

* * *

"Sec. 7. Audit. No application for financial assistance under this act shall be approved except upon audit of vouchers or other documents by the commissioner as are necessary to insure that such payment is lawful and proper.

"The state department of audit and control shall from time to time examine any and all necessary accounts and records of a qualifying school to which an apportionment has been made pursuant to this act for the purpose of determining the cost to such school of rendering the services referred to in section three of this act. If after such audit it is determined that any qualifying school has received funds in excess of the actual cost of providing the services enumerated in section three of this act, such school shall immediately reimburse the state in such excess amount."

* * *

Chapter 508 of the New York Laws of 1974, amending Chapter 507, provides as follows in pertinent part:

"Sec. 9. In enacting this chapter it is the intention of the legislature that if section seven or any other provision of this act or any rules or regulations promulgated thereunder shall be held by any court to be invalid in whole or in part or inapplicable to any person or situation, all remaining provisions or parts thereof or remaining rules and regulations or parts thereof not so invalidated shall nevertheless remain fully effective as if the invalidated portion had not been enacted or promulgated, and the application of any such invalidated portion to other persons not similarly situated or other situations shall not be affected thereby."

(The full text of Chapter 508 of the Laws of 1974 is set out as Appendix "E" hereto.)

Questions Presented

1. Does the reimbursement by the State of nonpublic schools for costs of record keeping and testing violate the Establishment Clause of the First Amendment to the Constitution of the United States, where the records are kept and the tests are administered pursuant to requirements of State law and regulation for the purpose of determining whether or not the nonpublic schools are complying with the State's compulsory attendance laws, both in terms of actual attendance of pupils

upon instruction and in terms of the requirement that such nonpublic schools provide an acceptable prescribed minimum standard of education to the pupils so enrolled?

2. Does Chapter 507, as amended by Chapter 508, of the New York Laws of 1974 comply with the guidelines set down by the decision of this Court in *Levitt* v. *Committee for Public Education and Religious Liberty, supra,* by eliminating teacher-prepared tests from those whose costs are subject to reimbursement and by providing reimbursement for only the actual costs of the services rendered?

Statement of the Case

Plaintiffs commenced this action to have Chapters 507 and 508 of the New York Laws of 1974 declared unconstitutional, alleging that those statutes violate the Establishment Clause of the First Amendment to the Constitution of the United States. Plaintiffs also alleged that the statutes violate the Free Exercise of Religion Clause of the First Amendment in that they prevent the free exercise of plaintiffs' religion through compulsory taxation to support religious schools. The complaint also sought an injunction restraining the implementation of the laws, insofar as they provide money for sectarian schools.

A motion to intervene in the action was made by a group of nonpublic schools which are beneficiaries of payments under the acts. The motion was granted.

Subsequent to the granting of an order for the convening of a three-judge District Court, interrogatories were served by plaintiffs on the defendants and intervenor-defendants. The answers to those interrogatories are exhibits to the record in this case.

The District Court, in its decision, found the New York statutes to be unconstitutional in that they contravene the prohibitions of the Establishment Clause of the First Amendment, but did not reach the question of whether they also

violated the Free Exercise Clause, as alleged by plaintiffs. The Court based its decision upon the recent decision of this Court in *Meek* v. *Pittinger* (421 U.S. 349 [1975]), although the Court observed that absent that decision it might have held the statutes valid based on this Court's decision in *Levitt* v. *Committee for Public Education and Religious Liberty* (413 U.S. 472 [1973]). The Court found that the statutes have a "secular legislative purpose", but also that they have the "primary effect" of advancing religion, based solely on this Court's decision in *Meek* v. *Pittinger, supra.* The District Court quoted from that part of this Court's decision relative to the loan of materials and equipment to the schools, apparently analogizing the State prepared tests here at issue with teaching equipment. The District Court also pointed out that the services for which compensation is made are performed during regular school hours; that they were essential to be performed, with or without compensation, in order for the schools to continue to qualify as educational alternatives to public schools. The Court thereupon concluded that the reimbursement for these testing and record keeping services is mere subsidization of the sectarian schools and results in the "direct advancement of religion". Having decided the case on that issue, the Court did not reach the question of whether the statutes resulted in excessive entanglement between government and religion or whether they violate the Free Exercise Clause.

The Question Is Substantial

Over a period of years, this Court has considered the question of what form of payments or aid may be provided to nonpublic schools or to children enrolled in them. The Court has held that school bus transportation may be provided to children attending sectarian schools (*Everson* v. *Board of Education,* 330 U.S. 1); that textbooks may be provided to children attending church-related schools (*Board of Education* v. *Allen, supra; Meek* v. *Pittinger, supra*); that public moneys may be spent for the construction of academic buildings at

church-related colleges (*Tilton* v. *Richardson*, *supra*); and has also held that payments may not be made either to schools or individuals for the cost of teaching or teachers' salaries (*Lemon* v. *Kurtzman*, *supra*) nor for the provision of remedial services or teaching equipment (*Meek* v. *Pittinger*, *supra*); nor for school building rehabilitation (*Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U. S. 756 [1973]). None of these cases involved the precise question here at issue, that is, whether the State, having mandated that nonpublic schools keep certain records and administer certain tests to determine whether or not the children enrolled in those schools are receiving a full-time and adequate education, may reimburse those schools for all or a part of the cost of those record keeping and testing services.

This Court has never had occasion to rule upon whether the State which imposes administrative burdens upon nonpublic schools may also alleviate those burdens by reimbursing the schools for all or a part of the costs thus imposed. The Court did, in *Levitt* v. *Committee for Public Education and Religious Liberty*, *supra*, indicate that it might have so found had the statute there at issue not also provided reimbursement for teacher prepared tests, but there was no definitive ruling on the question in that case.

New York State has set minimum standards of educational quality through the requirements of various sections of the New York Education Law, such as the provisions of Article 17 thereof, which require certain subjects to be taught in nonpublic schools as well as in public schools, and the provisions of sections 3204 and 3210 of the Education Law, which require that the educational offerings of nonpublic schools must be "at least substantially equivalent" to that of the public schools in the pupil's district of residence. Furthermore, subdivision 2 of section 305 of the Education Law, which provides for the general powers of the Commissioner of Education, states that he shall have the general supervision over all schools and institutions which are subject to the provisions

of the Education Law or of any statute relating to education and that he must cause all these schools to be examined and inspected.

For the purpose of controlling the educational quality of the State education system, various measuring devices are used by the Education Department, such as the Regent's examinations, the so-called "PEP Tests" (Pupil Evaluation Program) in grades 3, 6 and 9, as well as other testing devices which require the results of such tests to be reported to the Education Department. These measuring devices are used in relation to both public and nonpublic school pupils.

In addition, various reports are required from nonpublic as well as public schools, all of which procedures and devices have the purpose of making sure that the minimum State educational standards are maintained throughout all the schools in the State, both public and nonpublic alike.

The expressed purpose of Chapter 507 as set forth in the first section of the Act, is to fulfill the State's responsibility "to provide educational opportunity of a quality which will prepare its citizens for the challenges of American life in the last decades of the twentieth century", by evaluating, "through a system of uniform state testing and reporting procedures", the quality and effectiveness of instruction and by assuring that pupils attend upon instruction "as required by law" and are being adequately educated.

The legislative findings also recognize that these objections are fulfilled as to public schools in part through financial assistance to local school districts and find that it is a matter of State concern to provide reimbursement for these expenses to nonpublic schools as well as to public schools. Chapter 507 provides for reimbursement to the schools of the actual cost of administering such tests and keeping records and reporting

thereon to the State.[1] The sum of $8,000,000 has been appropriated for payments for this purpose to be made in the current fiscal year.[2]

Accounting procedures have been prescribed for the nonpublic schools and their claimed costs are subject to audit at the option of the State Comptroller.

New York's educational system has been, for purposes of supervision at least, a unitary one for many years, ever since the initial creation of the Board of Regents early in the nineteenth century.

New York's legislative history clearly shows the incorporation of nonpublic schools within the State's ambit of educational concern. For example, in the State of New York nonpublic schools are chartered by the Board of Regents (Education Law, Sec. 216). There is regular inspection by the Education Department of the nonpublic as well as the public schools (Education Law, Sec. 305[2]). Nonpublic schools are exempt from taxation (Real Property Tax Law, Sec. 420). Attendance at a nonpublic school complies with the State's compulsory education law (Education Law, Sec. 3204) and satisfies the requirement for part-time attendance (Education Law, Sec. 4601). Terms of attendance in the nonpublic as well as the public school are prescribed (Education Law, Sections 3204-3205), and certain curriculum requirements are imposed (Education Law, Sections 3204, 801, 803, 806-808, 3002).

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1 Chapter 138 of the Laws of 1970, at issue in *Levitt* v. *Committee for Public Education and Religious Liberty, supra*, provided for a per pupil payment to each school, without regard to cost of the services rendered.

2 Pursuant to Chapter 138, the sum of $28,000,000 was appropriated annually.

The State has not only imposed these requirements on the nonpublic schools but it has also recognized the importance of insuring that these requirements are complied with by both sectarian and nonsectarian nonpublic schools. In furtherance of that interest, an exception was incorporated into the New York State Constitution's prohibition against the use of public moneys in aid of denominational schools, authorizing the use of public moneys "for examination or inspection" (Article XI, Sec. 3).

It has long been recognized both legislatively and judicially, that the First Amendment to the Constitution of the United States does not prohibit all contact between government and religion. Federal funds for missionaries to the Indians were first paid under President Washington and continued until 1900 when changed conditions on the reservations, not constitutional problems, resulted in a change in the system. The First and Third Congresses, also under Washington, created the military chaplaincies for which Federal funds are still being paid. Under every Congress there have been chaplains in the House and Senate and in Federal institutions, such as hospitals and correctional institutions, and religious services are held at the United States military academies. Sectarian property and income is tax exempt; clergymen and divinity students have been made exempt from the draft, as are conscientious objectors; the Bible is used for administering oaths; NYA and WPA funds were available to both public and sectarian schools during the depression period; religious organizations are given special postal privileges; and hospitals owned by religious organizations are eligible for aid under the Hill-Burton Hospital Construction Act (Hill-Burton Act of 1946, 60 Stat. 1040, 42 U.S.C. Sections 29-92).

Many other Federal statutes have provided nondiscriminatory aid to students attending both public and nonpublic schools, both directly and through the institutions they attend. Among these are the National School Lunch Act (60 Stat. 230 [1946], 42 U.S.C. Sec. 1751), free milk under the

Agriculture Act of 1949 (63 Stat. 1051 [1949], 7 U.S.C. Sec. 1431), the National Defense Education Act of 1958 (72 Stat. 1580 [1958], 20 U.S.C. Sections 401-589), College Housing Act of 1950 (12 U.S.C. Sections 1749-1749c), the Higher Education Facilities Act (77 Stat. 363 [1963], 20 U.S.C. Sections 701-757, *Tilton* v. *Richardson*, 403 U. S. 672 [1971], the Higher Education Act (79 Stat. 1219 [1965], 20 U.S.C. Sections 1001-1144), the Elementary and Secondary Education Act (79 Stat. 27 [1965], 20 U.S.C. Sections 236-244, 331-332), the Surplus Property Act of 1944 which resulted in 488 grants of land and buildings to church-related schools of 35 denominations (58 Stat. 765 [1944], 40 U.S.C. Sections 484(j) and 484(k); 107 Cong. Rec. 17351), and the G. I. Bill of Rights (66 Stat. 663 [1952], 38 U.S.C. Sec. 911).

From this listing we must assume that either the Congress and the Presidents have been totally wrong under the Constitution or that the First Amendment prohibition of an establishment of religion does not bar nonpreferential aid to all schools, all pupils, or all institutions, regardless of their religious affiliation.

Probably the most often quoted case, on both sides of the establishment argument, is the *Everson* case (*Everson* v. *Board of Education*, 330 U. S. 1 [1947]). In that case, this Court held that the nonpreferential provision of school bus transportation for children attending both public and nonpublic schools did not constitute aid to or an establishment of religion. In so holding, the Court in an opinion by MR. JUSTICE BLACK, clearly set forth the purpose and intent of the Establishment Clause, stating (pp. 15-16):

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs,

> for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*."

The common denominator in all the activities there stated to be prohibited is that the law, activity, or tax must be directed to the aid of religion as such. That decision did not declare to be prohibited general public programs not intended or directed to the aid of religion which, by the fact that they incidentally aid adherents to a particular religion or to all religions, also incidentally or collaterally aid the religion.

Of great importance in demonstrating the substantiality of the question here involved are the decisions of this Court in *Lemon* v. *Kurtzman*, *supra*, and *Tilton* v. *Richardson*, *supra*, as the latest examination by the Court of questions under the First Amendment. An analysis of those decisions clearly shows that the program enacted by Chapter 507 is not prohibited under the decisions of this Court and is, in fact, a valid, constitutional program of the State and that the question here raised is, thus, substantial and should be considered by the Court.

In the *Lemon* case, this Court was confronted with two statutes, one of which provided a subsidy for the payment of teachers' salaries in nonpublic schools and the other provided compensation for the teaching of certain secular subjects in nonpublic schools. In *Tilton*, the Federal Higher Education Facilities Act, providing for the construction of college academic buildings, was involved.

Examining the statutes in those cases, this Court observed in *Lemon* (612):

> "Candor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation [between constitutionality and unconstitutionality] in this extraordinarily sensitive area of constitutional law."

and again (614):

> "Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship."

In *Tilton*, the Court repeated the statement first above quoted as applicable to that case as well (678).

The tests of constitutionality were stated in *Lemon* as being (612-613):

> "In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity,' *Walz* v. *Tax Commission*, 397 U. S. 664, 668 (1970).
>
> * * *
>
> "* * * Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education* v. *Allen*, 392 U. S. 236, 243 (1968); finally, the statute must not foster 'an excessive governmental entanglement with religion.' *Walz*, *supra*, at 674."

In *Tilton*, this Court also said (679):

> "The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion."

In applying those tests, the Court observed in *Lemon* (615):

> "In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions which are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."

In the instant case, while the character and purposes of the institutions benefited may be the same as those in *Lemon*, the

nature of the aid provided and the resultant relationship between government and religion are vastly different.

This Court in the *Tilton* and *Lemon* cases recognized that the State has certain legitimate concerns which establish a legitimate area of contact with sectarian schools, and that certain types of aid are by their nature constitutional even though they may provide some indirect benefit to the sectarian mission of the schools. In that regard, the Court said in *Lemon* (613):

> "A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate."

and again (614):

> "Fire inspections, building and zoning regulations, and state requirements under compulsory school attendance laws are examples of necessary and permissible contacts."

In that regard, it should be noted that Chapter 507 is directed, in part, to assuring compliance with the compulsory school attendance laws of the State.

Further, in *Lemon*, this Court *also* observed (616-617):

> "Our decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral, or non-ideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause."

Two other decisions of this Court are of primary significance to the question of whether this Court should take jurisdiction of the appeal – *Levitt* v. *Committee for Public Education and Religious Liberty*, *supra*, and *Meek* v. *Pittinger*, *supra*. In *Levitt*, this Court construed Chapter 138 of the New York Laws of 1970, a statute similar to that at issue here, except that it included reimbursement for the costs of teacher-prepared tests, which Chapter 507 does not, and provided for a lump sum payment, unrelated to actual cost, as opposed to Chapter 507's reimbursement for actual costs. Comparing the fact

situation in *Levitt* with that in *Committee for Public Education and Religious Liberty* v. *Nyquist, supra*, decided the same day, the opinion of this Court stated (413 U. S. pp. 479-480):

> "The statute now before us, as written and as applied by the Commissioner of Education, contains some of the same constitutional flaws that led the Court to its decision in *Nyquist*.[7] As noted previously, Chapter 138 provides for a direct money grant to sectarian schools for performance of various 'services.' Among those services is the maintenance of a regular program of traditional internal testing designed to measure pupil achievement. Yet, despite the obviously integral role of testing in the total teaching process, no attempt is made under the statute, and no means are available, to assure that internally prepared tests are free of religious instruction."

Distinguishing *Everson* and *Allen*, this Court held (413 U.S., p. 481):

> "In this case, however, we are faced with state-supported activities of a substantially different character from bus rides or state-provided textbooks. Routine teacher-prepared tests, as noted by the District Court, are 'an integral part of the teaching process.' 342 F. Supp., at 444. And, '[i]n terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not.' *Lemon* v. *Kurtzman, supra*, 403 U.S., at 617."

"7 We do not doubt that the New York Legislature had a 'secular legislative purpose' in enacting Chapter 138. See *Epperson* v. *Arkansas*, 393 U.S. 97 (1968). The first section of the Act provides that the State has a 'primary responsibility' to assure that its youth receive an adequate education; that the State has the 'duty and authority' to examine and inspect all schools within its borders to make sure that adequate educational opportunities are being provided; and that the State has a legitimate interest in assisting those schools insofar as they aid the State in fulfilling its responsibility."

It is submitted that the determinative difference between Chapter 138, held invalid in *Levitt*, and Chapters 507 and 508, at issue here, is the absence in the latter statutes of compensation for teacher-prepared tests. This is apparent from the conclusion of this Court's opinion in *Levitt* (413 U.S., p. 482):

> "We hold that the lump sum payments under Chapter 138 violate the Establishment Clause. Since Chapter 138 provides only for a single per-pupil allotment for a variety of specified services, some secular and some potentially religious, neither this Court nor the District Court can properly reduce that allotment to an amount corresponding to the actual costs incurred in performing reimbursable secular services. That is a legislative, not a judicial function."

Here there are no teacher-prepared tests, no single per-pupil allotment, but only a statute providing for reimbursement for the actual cost of State-prepared and mandated tests and attendance records.

Subsequent to this Court's decision in *Levitt*, the New York State Legislature enacted Chapters 507 and 508 in order to meet what is construed to be guidelines to permissible legislation. It eliminated reimbursement for teacher-prepared tests and provided reimbursement for actual costs, not single per-pupil grants. Indeed, the District Court in the instant case observed that it might have held the statutes constitutional on the authority of *Levitt* were it not for the intervening decision of this Court in *Meek*, which the District Court construed as barring all direct money payments to sectarian schools. However, we submit that *Meek* does not so hold and that this Court should accept jurisdiction in this case to clarify the relationship between its decisions in *Levitt* and *Meek*.

The statutes involved in *Meek* provided for the loan of textbooks to nonpublic school pupils, which this Court held to be valid, and also provided for auxiliary services, such as guidance, counseling and testing services, speech and hearing services, and remedial programs, to be given to nonpublic school pupils by public school employees and for the loan of instructional

materials and equipment to nonpublic schools. This Court held both the latter programs to be unconstitutional.

The District Court in the instant case equated this Court's invalidation of the Pennsylvania statute relative to instructional materials with the reimbursement for State testing services under Chapter 507. We do not believe the analogy correctly interprets this Court's decision.

In *Meek*, this Court found the instructional material and equipment to be an inextricable part of the teaching process -- the same basis upon which reimbursement for teacher-prepared tests was invalidated in *Levitt*. The tests at issue here are measuring devices, for the benefit of the State, of the achievement of pupils and the adequacy of education they receive, not an intrinsic part of the educational process of the schools. There is nothing in this Court's decision in *Meek* which would necessarily lead to the invalidation of the programs at issue here.

In the instant case, defendants contend that the aid involved is secular, neutral and non-ideological. It compensates the schools for record keeping required by the State in enforcing the compulsory attendance laws and statutes and regulations requiring minimum course standards and for the administration of State-required and prepared tests. Those tests are designed by the State and are the same tests provided by the State to public as well as nonpublic schools and thus are both secular and non-ideological in nature.

The statute here in question does not involve the State in the actual educational process of the private schools. It does no more than compensate the private schools, sectarian and nonsectarian alike, for the expense of record keeping and administration of examinations necessary to assure that those schools are maintaining that quality of secular education necessary for the young people of the State.

It is necessarily a secular purpose and intent to see that children attending nonpublic schools comply with the compulsory

attendance laws of the State, that they are receiving an adequate education from qualified teachers, and that they are tested in accordance with State standards of academic achievement.

The issues here raised and the statute here involved have not been directly considered by this Court in any prior decision. The question of a State's ability to reimburse schools for the cost of mandated services to the State is substantial, both in terms of the extent of the State's ability to require such services and of the ability of the schools to provide such services, as well as in terms of the right to reimburse the schools for all or a part of the cost of those services.

CONCLUSION

APPELLANTS RESPECTFULLY PRAY THAT THIS COURT NOTE PROBABLE JURISDICTION IN THIS CAUSE AND PLACE THE CASE UPON ITS CALENDAR FOR ARGUMENT.

Dated: October 14, 1976

Respectfully submitted,

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APPENDIX

APPENDIX A — Opinion.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Argued March 31, 1976 Decided June 21, 1976

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON,

Plaintiffs,

— *against* —

ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Defendants,

— and —

HORACE MANN-BARNARD SCHOOL, LA SALLE ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL, ST. MICHAEL SCHOOL and YESHIVAH RAMBAM,

Intervenor-defendants.

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74 Civ. 2648

Before MANSFIELD, Circuit Judge, and LASKER and WARD, District Judges.

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WARD, District Judge

This case requires us to determine whether Chapter 507, as amended by Chapter 508, of the 1974 Laws of New York ("the statute"), which provides for reimbursement to private schools of expenses allocable to the performance of certain state "mandated" pupil testing and record keeping, is offensive to the Establishment Clause of the First Amendment.

Plaintiffs, who commenced this action less than one month after the statute was signed into law, are an association, with numerous organization members, whose objectives include

opposition to the use of public funds for the support of sectarian schools, and individual New York State taxpayers. Defendants are the Commissioner of Education and the State Comptroller. Intervenor-defendants are one non-sectarian and four sectarian private schools which receive funds pursuant to the statute. Plaintiffs seek a declaration that the statute is unconstitutional and an injunction against the allocation and use of public funds for the support of religious schools.

Upon the request of the parties, this three-judge court was convened pursuant to 28 U.S.C. Sections 2281 and 2283. The parties have agreed that the case shall be determined on the pleadings and the defendants' and intervenor-defendants' answers to plaintiffs' interrogatories.

I

The statute, which became effective July 1, 1974, provides for reimbursement to non-public schools of the "actual cost" of complying with state requirements for pupil attendance reporting and the administration of state prepared examinations such as regents examinations, the pupil evaluation program, and the basic educational data system.[1] These reports and tests are required of public and non-public schools alike. The statute was passed by the Legislature, pursuant to the proposal of the Regents, to replace Chapter 138 of the 1970 Laws of New York which had been declared unconstitutional in *Levitt* v. *Committee for Public Education & Religious Liberty*, 413 U.S. 472 (1973). It was drafted to eliminate those features of Chapter 138 which the Supreme Court found offensive to the First Amendment, specifically reimbursement for traditional teacher-prepared examinations and the failure to limit reimbursement to actual costs incurred.

According to defendants' answers to plaintiffs' interrogatories, there are 1954 non-public schools eligible to receive reimbursement pursuant to the statute, approximately 85% of which are religiously affiliated. Although the characteristics of these sectarian institutions vary widely, schools which

> (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial or dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, and/or (10) impose religious restrictions on what the faculty may teach

are permissible beneficiaries.[2]

Schools must apply for reimbursement listing the amount claimed for each service rendered separately.[3] Reimbursable costs include teacher salaries, fringe benefits, supplies, and other contractual expenditures such as data processing services. Section 7 of the statute requires schools applying for financial assistance to submit vouchers, capable of audit, to insure the propriety of payment.[4] To implement this section, defendants have promulgated forms which require applicants for reimbursement to list separately the amount claimed for each reimbursable cost for each reimbursable service. For reimbursement of personnel salaries and fringe benefits, the defendants also require the submission of a form entitled "Justification of Salary and Fringe Benefit Costs Claimed For State Aid For Testing, Reporting and Evaluating." Such reimbursable costs are calculated on this form by first determining the percentage of total work time spent performing reimbursable services. Gross wages and fringe benefits are then multiplied by the resulting percentage. It should be noted that the

resulting reimbursable amount does not represent any additional sum expended over and above ordinary teacher and other personnel compensation, but rather represents a percentage of compensation which would be paid whether or not employee time was spent in performing state required services.

The statute, also, makes a provision for further audit of underlying records, if necessary, and reimbursement to the state in the event of overpayment.[5] Defendants have promulgated suggested accounting procedures so that records are kept which are capable of such an audit.[6]

From an examination of the intervenor-defendants' answers to plaintiffs' interrogatories, the bulk of reimbursement claimed is for salaries and fringe benefits. The total amounts claimed vary from school to school, depending in part upon the services performed. For example, for teacher salaries and fringe benefits for attendance, the amount claimed varies from approximately 1% to 5.4% of the aggregate cost of these budget items to the different schools. It has been estimated that the cost to the state of providing reimbursement to private schools, pursuant to the statute, will be between $8,000,000 and $10,000,000 annually.

II

The complaint alleges that this statutory scheme for providing financial assistance to sectarian and non-sectarian schools violates the Establishment Clause in that its primary effect is to advance religion and in that it results in an excessive entanglement of state government in religion. The complaint, also, alleges a violation of the Free Exercise Clause of the First Amendment in that the statute constitutes compulsory taxation for the support of religion and religious schools.[7]

Defendants, for their part, argue that the statute does not offend the Constitution because reimbursement is limited to services which are clearly secular and that no excessive entanglement results from the provision for an optional audit of books and accounts in that there is no audit of educational content.

III

We turn now to the constitutional question posed: Whether the First Amendment's prohibition of any law "respecting the establishment of religion" is violated by a state law which provides for direct payments by the state to non-public sectarian schools for those portions of their operating costs which are attributable to compliance with state attendance, testing and reporting requirements. The constitutional standards may be easily stated:

> "First, the statute must have a secular legislative purpose . . . Second, it must have a 'primary effect' that neither advances nor inhibits religion. . . . Third, the statute and its administration must avoid excessive government entanglement with religion." *Meek* v. *Pittenger*, 421 U.S. 349, 358 (1975) (citations omitted).

Unfortunately, these tests are more easily stated than applied.

> For it is evident from the numerous opinions of the [Supreme] Court, and of Justices in concurrence and dissent in the leading cases applying the Establishment Clause, that no "bright line" guidance is afforded. Instead, while there has been general agreement upon the applicable principles and upon the framework of analysis, the Court has recognized its inability to perceive with invariable clarity the "lines of demarcation in this extraordinarily sensitive area of constitutional law." *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971).

Committee for Public Education & Religious Liberty v. *Nyquist*, 413 U.S. 756, 761 n. 5 (1973). Thus, with due regard for the complexity of the questions, we turn to the application of the standards to the facts of the instant case.

We need not pause long to determine whether the statute passes constitutional muster under the first part of the tripartite test. The legislative purpose is contained in Section 1 of Chapter 507 as follows:

> The state has the responsibility to provide educational opportunity of a quality which will prepare its citizens for the challenges of American life in the last decades of the twentieth century.
>
> To fulfill this responsibility, the state has the duty and authority to evaluate, through a system of uniform state testing and reporting procedures, the quality and effectiveness of instruction to assure that those who are attending instruction, as required by law, are being adequately educated within their individual capabilities.
>
> In public schools these fundamental objectives are accomplished in part through state financial assistance to local school districts.
>
> More than seven hundred thousand pupils in the state comply with the compulsory education law by attending nonpublic schools. It is a matter of state duty and concern that such nonpublic schools be reimbursed for the actual costs which they incur in providing services to the state which they are required by law to render in connection with the state's responsibility for reporting, testing and evaluating.

The predecessor statute, Chapter 138, 1970 Laws of New York, had a very similar legislative purpose. In *Levitt* v. *Committee for Public Education & Religious Liberty*, *supra*, the court stated:

> We do not doubt that the New York legislature had a "secular purpose" in enacting Chapter 138.

413 U.D. at 479, n. 7. We are constrained to hold likewise here.

The nub of the controversy between the respective parties focuses on the second and, for this case, the crucial test of the

primary effect of the statute. Defendants argue that the payments provided by the statute are for "neutral, secular and non-idealogical" services performed by the non-public schools to serve the state's secular interests in the education they provide. As such, defendants conclude that these payments do not have the primary effect of advancing religion and that, if anything, there is only the incidental effect that the institutions' funds may be "freed up" for the furtherance of their religious mission. Further, they contend that in *Levitt* v. *Committee for Public Education & Religious Liberty*, *supra*, the court impliedly held that payments such as those authorized by the statute would be constitutionally permissible.

Absent the decision in *Meek* v. *Pittenger*, *supra*, we might have found defendants' arguments persuasive. However, in light of the decision in *Meek*, we fail to see any alternative but to declare the statute unconstitutional because it has the primary effect of advancing religion.

At issue, in *Meek*, was the constitutionality of two Pennsylvania statutes which provided auxiliary services and instructional material and equipment to the non-public schools of the state, 75% of which were sectarian in character. Auxiliary services included counseling, testing, psychological services, speech and hearing therapy and special education. Instructional materials included periodicals, photographs, maps, records and films. Instructional equipment included audiovisual and laboratory equipment. The Supreme Court held that the statutes were unconstitutional except insofar as they provided for the loan of textbooks to non-public school students. With respect to the loan of instructional material and equipment, the court found that while the materials themselves may be secular and non-ideological, the aid thereby

provided had the primary and direct effect of advancing the religious mission of the sectarian beneficiaries of the Act. The court stated:

> To be sure, the material and equipment that are the subjects of the loan - - maps, charts, and laboratory equipment, for example - - are "self-polic[ing], in that starting as secular, nonideological and neutral, they will not change in use." 374 F. Supp. 639, 660. But faced with the substantial amounts of direct support authorized by Act 195, it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools and to then characterize Act 195 as channeling aid to the secular without providing direct aid to the sectarian. Even though earmarked for secular purposes, "when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission," state aid has the impermissible primary effect of advancing religion. *Hunt* v. *McNair*, 413 U.S. 734, 743.
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> * * *
>
> Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole. "[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. . . . For this reason, Act 195's direct aid to Pennsylvania's predominantly church-related, nonpublic elementary and secondary schools, even though ostensibly limited to wholly neutral, secular instructional material and equipment, inescapably results in the direct and substantial advancement of religious activity, cf. Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S., at 781-783 and n. 39, and thus constitutes an impermissible establishment of religion.

413 U.S. at 365-66 (footnote omitted).

We need only repeat what the Court stated in *Meek* to dispose of the constitutional question here. In the present case,

it is conceded that the attendance taking and test administration are performed during regular school hours by school personnel and would be so performed whether or not reimbursement is available. It is, also, conceded that the payments made pursuant to the statute do not represent extraordinary expenditures necessitated primarily by compliance with state requirements. In order to continue to qualify as institutions providing an educational alternative to public schools, the private school beneficiaries must continue to comply with the state's reporting and testing requirements. *See, e.g.*, N.Y. Education Law Sections 214-216, 3210.2, 3211 (McKinney's 1969, 1970). Compliance with state laws regulating education is as much a part of the educational function of private schools as classroom instruction in secular subjects.[8] For the state to reimburse private schools for compliance in the manner provided by the statute is, in reality, to subsidize their operating costs. In light of these facts, it is clear that the aid to the secular functions of sectarian schools provided by the statute is in fact aid to the sectarian school enterprise as a whole and results in the direct advancement of religion.

The sole basis offered by defendants and intervenors for distinguishing the decision in *Meek* from the instant case is that the monetary aid provided any one school is insubstantial in terms of each school's operating expenses. We cannot agree. In *Meek*, the court characterized the $12 million authorized to be paid to the 1320 non-public schools of Pennsylvania of which 75% had religious affiliations as "massive" and "substantial". We can perceive no legally relevant distinction between the $12 million of public funds involved in *Meek* and the $8-$10 million at issue here.

Moreover, the touchstone under the Establishment Clause is not how much public support any one religious institution receives but rather that public funds are used to support religion in general.

> "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."

Everson v. *Board of Education*, 330 U.S. 1, 16 (1947).

Since the statute under consideration thus fails to meet the second prong of the standard established by the Supreme Court for constitutional review of such provisions, it becomes unnecessary to decide whether it satisfies the third requirement, avoidance of excessive entanglement with religion.

Accordingly, we hold that Chapter 507, as amended by Chapter 508, is unconstitutional to the extent that it authorizes the allocation of funds to sectarian schools and we enjoin the application of the Act to such schools.[9]

Settle judgment on notice.

s/ WALTER R. MANSFIELD
U. S. C. J.

s/ MORRIS E. LASKER
U. S. D. J.

s/ ROBERT J. WARD
U. S. D. J.

FOOTNOTES

1. The operative provision of the statute is contained in Sec. 3, which provides:

> The commissioner shall annually apportion to each qualifying school, for school years beginning on and after July first, nineteen hundred seventy-four, an amount equal to the actual cost incurred by each such school during the preceding school year for providing services required by law to be rendered to the state in compliance with the requirements of the state's pupil evaluation program, the basic educational data system, regents examinations, the statewide evaluation plan, the uniform procedure for pupil attendance reporting, and other similar state prepared examinations and reporting procedures.

2 Although four of the intervenor-defendants are religiously affiliated, none meets all of the characteristics enumerated in the text.

3 Section 4 of the statute provides:

> Each school which seeks an apportionment pursuant to this act shall submit to the commissioner an application therefor, together with such additional reports and documents as the commissioner may require, at such times, in such form and containing such information as the commissioner may prescribe by regulation in order to carry out the purposes of this act.

4 Section 7 states in pertinent part:

> No application for financial assistance under this act shall be approved except upon audit of vouchers or other documents by the commissioner as are necessary to insure that such payment is lawful and proper.

5 Section 7 of the Act provides in pertinent part:

> The state department of audit and control shall from time to time examine any and all necessary accounts and records of a qualifying school to which an apportionment has been made pursuant to this act for

> the purpose of determining the cost to such school of rendering the services referred to in section three of this act. If after such audit it is determined that any qualifying school has received funds in excess of the actual cost of providing the services enumerated in section three of this act, such school shall immediately reimburse the state in such excess amount.

6 Section 5 of the statute provides:

> Each school which seeks an apportionment pursuant to this act shall maintain a separate account or system of accounts for the expenses incurred in rendering the services required by the state to be performed in connection with the reporting, testing and evaluation program enumerated in section three of this act. Such records and accounts shall contain such information and be maintained in accordance with regulations issued by the commissioner, but for expenditures made in the school year nineteen hundred seventy-three-seventy-four, the application for reimbursement made in nineteen hundred seventy-four pursuant to section four of this act shall be supported by such reports and documents as the commissioner shall require. In promulgating such record and account regulations and in requiring supportive documents with respect to expenditures incurred in the school year nineteen hundred seventy three-four, the commissioner shall facilitate the audit procedures described in section seven of this act. The records and accounts for each school year shall be preserved at the school until the completion of such audit procedures.

7 Plaintiffs have not pressed this claim before the Court. In view of our disposition on Establishment Clause grounds, we do not reach the Free Exercise claim.

8 Of course, the mere application of a state law to a school system does not necessarily "regulate education." *See, e.g., Meek* v. *Pittenger*, 421 U.S. 349, 364 (1975).

9 Chapter 508 added a severability clause to the Act reading as follows:

> Sec. 9. In enacting this chapter it is the intention of the legislature that if section seven or any other provision of this act or any rules or regulations promulgated thereunder shall be held by any court to be invalid in whole or in part or inapplicable to any person or situation, all remaining provisions or parts thereof or remaining rules and regulations or parts thereof not so invalidated shall nevertheless remain fully effective as if the invalidated portion had not been enacted or promulgated, and the application of any such invalidated portion to other persons not similarly situated or other situations shall not be affected thereby.

Unlike the situation in *Meek* v. *Pittenger*, see 421 U.S. at 371 n. 10, this clause is a clear statement of the legislature's intent to have the act remain in force as applied to nonsectarian schools, even if its application to sectarian schools were held to violate the Establishment Clause. Compare *Sloan* v. *Lemon*, 413 U.S. 825, 833-34 & n. 10.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON,

Plaintiffs,

— against —

ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Defendants,

— and —

HORACE MANN-BARNARD SCHOOL, LA SALLE ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL, ST. MICHAEL SCHOOL and YESHIVAH RAMBAM,

Intervenor-defendants.

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(RJW)

The parties having agreed that this case be determined on the pleadings and the defendants' and intervenor-defendants' answers to plaintiffs' interrogatories, and this case having come on to be heard before Hon. Walter R. Mansfield, Circuit Judge, and Hon. Morris E. Lasker and Robert J. Ward, District Judges on March 31, 1976, and the issue having been duly heard and a decision having been duly rendered, it is hereby

ORDERED, ADJUDGED and DECREED, that Chapter 507, as amended by Chapter 508, of the 1974 Laws of New York is unconstitutional to the extent that it authorizes the

allocation of funds to sectarian schools, and defendants are hereby permanently enjoined from applying said Act to such schools.

Dated: New York, New York
July 22, 1976.

s/ WALTER R. MANSFIELD
U. S. C. J.

s/ MORRIS E. LASKER
U. S. D. J.

s/ ROBERT J. WARD
U. S. D. J.

JUDGMENT ENTERED — 7-28-76

s/ Raymond F. Burghardt
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON,

Plaintiffs,

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ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Defendants,

— and —

HORACE MANN-BARNARD SCHOOL, LA SALLE ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL, ST. MICHAEL SCHOOL and YESHIVAH RAMBAM,

Intervenor-defendants.

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74 Civ. 2648 (RJW)

SIRS:

Notice is hereby given that defendants Arthur Levitt, as Comptroller of the State of New York, and Ewald B. Nyquist, as Commissioner of Education of the State of New York, hereby appeal to the Supreme Court of the United States from the final judgment entered in this action on July 28, 1976, holding Chapter 507, as amended by Chapter 508, of the New York Laws of 1974 unconstitutional as constituting

an establishment of religion in violation of the First Amendment to the Constitution of the United States insofar as it authorizes the allocation of funds to sectarian schools, and granting a permanent injunction restraining the payment of funds to sectarian schools pursuant to such statute, and said defendants appeal from each and every part of said judgment.

This appeal is taken pursuant to 28 U.S.C. Sec. 1253.

Dated: Albany, New York
August 31, 1976

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APPENDIX D — Chapter 507 of the New York Laws of 1974.

Ch. 507 LAWS OF NEW YORK 1974

Non-Public Schools—State Aid—Testing, Evaluation Programs

Memorandum relating to this chapter, see page A-291

CHAPTER 507

An Act to provide for the apportionment of state monies to certain non-public schools, to reimburse them for their expenses in complying with certain state requirements for the administration of state testing and evaluation programs and for participation in state programs for the reporting of basic educational data.

Approved May 23, 1974, effective July 1, 1974.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Legislative findings. The legislature hereby finds and declares that:

The state has the responsibility to provide educational opportunity of a quality which will prepare its citizens for the challenges of American life in the last decades of the twentieth century.

To fulfill this responsibility, the state has the duty and authority to evaluate, through a system of uniform state testing and reporting procedures, the quality and effectiveness of instruction to assure that those who are attending instruction, as required by law, are being adequately educated within their individual capabilities.

In public schools these fundamental objectives are accomplished in part through state financial assistance to local school districts.

More than seven hundred thousand pupils in the state comply with the compulsory education law by attending nonpublic

schools. It is a matter of state duty and concern that such non-public schools be reimbursed for the actual costs which they incur in providing services to the state which they are required by law to render in connection with the state's responsibility for reporting, testing and evaluating.

Sec. 2. Definitions.

1. "Commissioner" shall mean the state commissioner of education.

2. "Qualifying school" shall mean a nonprofit school in the state, other than a public school, which provides instruction in accordance with section thirty-two hundred four of the education law.

Sec. 3. Apportionment. The commissioner shall annually apportion to each qualifying school, for school years beginning on and after July first, nineteen hundred seventy-four, an amount equal to the actual cost incurred by each such school during the preceding school year for providing services required by law to be rendered to the state in compliance with the requirements of the state's pupil evaluation program, the basic educational data system, regents examinations, the statewide evaluation plan, the uniform procedure for pupil attendance reporting, and other similar state prepared examinations and reporting procedures.

Sec. 4. Application. Each school which seeks an apportionment pursuant to this act shall submit to the commissioner an application therefor, together with such additional reports and documents as the commissioner may require, at such times, in such form and containing such information as the commissioner may prescribe by regulation in order to carry out the purposes of this act.

Sec. 5. Maintenance of records. Each school which seeks an apportionment pursuant to this act shall maintain a separate

account or system of accounts for the expenses incurred in rendering the services required by the state to be performed in connection with the reporting, testing and evaluation programs enumerated in section three of this act. Such records and accounts shall contain such information and be maintained in accordance with regulations issued by the commissioner, but for expenditures made in the school year nineteen hundred seventy-three—seventy-four, the application for reimbursement made in nineteen hundred seventy-four pursuant to section four of this act shall be supported by such reports and documents as the commissioner shall require. In promulgating such record and account regulations and in requiring supportive documents with respect to expenditures incurred in the school year nineteen hundred seventy-three—seventy-four, the commissioner shall facilitate the audit procedures described in section seven of this act. The records and accounts for each school year shall be preserved at the school until the completion of such audit procedures.

Sec. 6. Payment. No payment to a qualifying school shall be made until the commissioner has approved the application submitted pursuant to section four of this act.

Sec. 7. Audit. No application for financial assistance under this act shall be approved except upon audit of vouchers or other documents by the commissioner as are necessary to insure that such payment is lawful and proper.

The state department of audit and control shall from time to time examine any and all necessary accounts and records of a qualifying school to which an apportionment has been made pursuant to this act for the purpose of determining the cost to such school of rendering the services referred to in section three of this act. If after such audit it is determined that any qualifying school has received funds in excess of the actual

cost of providing the services enumerated in section three of this act, such school shall immediately reimburse the state in such excess amount.

Sec. 8. Noncorporate entities. Apportionments made for the benefit of any school which is not a corporate entity shall be paid, on behalf of such school, to such corporate entity as may be designated for such purpose pursuant to regulations promulgated by the commissioner. A school which is a corporate entity may designate another corporate entity for the purpose of receiving apportionments made for the benefit of such school pursuant to this act.

Sec. 9. This act shall take effect July first, nineteen hundred seventy-four.

Ch. 508 LAWS OF NEW YORK 1974

Schools—Nonpublic—State Aid—Testing, Evaluation Programs

Memorandum relating to this chapter, see page A-291

CHAPTER 508

An Act to amend a chapter of the laws of nineteen hundred seventy-four, entitled "An Act to provide for the apportionment of state monies to certain nonpublic schools, to reimburse them for their expenses in complying with certain state requirements for the administration of state testing and evaluation programs and for participation in state programs for the reporting of basic educational data", in relation to its applicability.

Approved May 23, 1974, effective July 1, 1974.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section nine of a chapter of the laws of nineteen hundred seventy-four, entitled "AN ACT to provide for the apportionment of state monies to certain nonpublic schools, to reimburse them for their expenses in complying with certain state requirements for the administration of state testing and evaluation programs and for participation in state programs for the reporting of basic educational data"[1] is hereby renumbered to be section ten, and a new section, to be section nine, is hereby added thereto, to read as follows:

Sec. 9. In enacting this chapter it is the intention of the legislature that if section seven or any other provision of this act or any rules or regulations promulgated thereunder shall be held

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[1] 1974 McKinney Session Laws, ch. 507.

by any court to be invalid in whole or in part or inapplicable to any person or situation, all remaining provisions or parts thereof or remaining rules and regulations or parts thereof not so invalidated shall nevertheless remain fully effective as if the invalidated portion had not been enacted or promulgated, and the application of any such invalidated portion to other persons not similarly situated or other situations shall not be affected thereby.

Sec. 2. This act shall take effect July first, nineteen hundred seventy-four.

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-595

ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Appellants,

and

HORACE MANN-BARNARD SCHOOL, LA SALLE ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL, and ST. MICHAEL SCHOOL,

Appellants,

and

YESHIVAH RAMBAM,

Appellant,

against

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON,

Appellees.

No. 76-713

LA SALLE ACADEMY, LONG ISLAND LUTHERAN HIGH SCHOOL and ST. MICHAEL SCHOOL,

Appellants,

and

YESHIVAH RAMBAM,

Appellant,

against

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERT ADAMS, BARBARA BROOKS, NAOMI COWEN, ROBERT B. ESSEX, FLORENCE FLAST, CHARLOTTE GREEN, HELEN HENKIN, MARTHA LATIES, BLANCHE LEWIS, ELLEN MEYER, REV. ARTHUR W. MIELKE, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, HOWARD M. SQUADRON, CHARLES H. SUMNER and CYNTHIA SWANSON,

Appellees.

Appeals from the United States District Court for the Southern District of New York

MOTION TO DISMISS OR AFFIRM

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TABLE OF CASES CITED

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-595

ARTHUR LEVITT, as Comptroller of the State of New York, *et al.*,

Appellants,

and

HORACE MANN-BARNARD SCHOOL, *et al.*,

Appellants,

and

YESHIVAH RAMBAM,

Appellant,

against

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *et al.*,

Appellees.

No. 76-713

LA SALLE ACADEMY, *et al.*,

Appellants,

and

YESHIVAH RAMBAM,

Appellant,

against

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *et al.*,

Appellees.

Appeals from the United States District Court for the Southern District of New York

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, the appellees move to dismiss the appeals or affirm the judgment of the court below on the ground that the question upon which review is sought has been rendered so unsubstantial by the unanimous opinion of the District Court that no further review by this Court is necessary or warranted.

Statement of the Case

The appellees accept the Statement of the Case as set forth on pages 6-7 of the Jurisdictional Statement of appellants Levitt and Nyquist.

ARGUMENT

This appeal presents no substantial federal question.

Appellants base their appeal on the assumption that, had this Court not decided *Meek* v. *Pittinger,* 421 U.S. 349 (1975), the judgment of the court below should have and would have been different. We express our disagreement with that assumption and respectfully submit that the same considerations which impelled the judgment in that case would have required judgment for the appellees in the present case. In *Committee for Public Education and Religious Liberty* v. *Nyquist,* 413 U.S. 756 (1973), for example, the Court invalidated a statute providing public funds for the maintenance and repair of church related school buildings, services considerably more distant from teaching than the pupil testing services involved in the present suit. Moreover, we believe that for the reasons set forth in our

brief to the court below the challenged statutes would be declared unconstitutional in that they required excessive entanglement between government and religion. Aside from this, however, we suggest that the appeal herein is *de facto* an effort to persuade this Court to reconsider and reverse its decision in *Meek* v. *Pittinger*. A *de jure* effort to achieve the same result failed when the Court denied the petition for rehearing of the appellees in that case. —— U.S. ——, 95 S. Ct. 2668.

The Pennsylvania statute invalidated in *Meek* specifically included "testing" within its definition of auxiliary services. That part of the statute was declared unconstitutional, even though the testing services were to be conducted by publicly employed personnel rather than, as in the instant case, by the regular church school teachers. It should be especially noted that in respect to "speech and hearing services" this Court went out of its way to indicate that the invalidation of the statute was not intended to apply to such services if they were enacted in a separate statute (421 U.S., at ——, 95 S. Ct. at 1766, fn. 21). The Court, however, made no such disclaimer in respect to "testing services," thus clearly expressing its intention to invalidate state financing of testing services in church schools.

There is, we submit, no way to escape the conclusion reached by the court below:

> We need only repeat what the Court stated in *Meek* to dispose of the constitutional question here. In the present case, it is conceded that the attendance taking and test administration are performed during regular school hours by school personnel and would be so performed whether or not reimbursement is available. It

is, also, conceded that the payments made pursuant to the statute do not represent extraordinary expenditures necessitated primarily by compliance with state requirements. In order to continue to qualify as institutions providing an educational alternative to public schools, the private school beneficiaries must continue to comply with the state's reporting and testing requirements. *See, e.g.,* N.Y. Education Law §§214-216, 3210.2, 3211 (McKinney's 1969, 1970). Compliance with state laws regulating education is as much a part of the educational function of private schools as classroom instruction in secular subjects. For the state to reimburse private schools for compliance in the manner provided by the statute is, in reality, to subsidize their operating costs. In light of these facts, it is clear that the aid to the secular functions of sectarian schools provided by the statute is in fact aid to the sectarian school enterprise as a whole and results in the direct advancement of religion. [Footnote omitted.]

Reversing the decision of the court below would require overruling *Meek*. But that alone would not be sufficient, for the Court would also be required to overrule *Nyquist*, upon which *Meek* was based. Even this would not suffice, since it would meet only the holding of the District Court in the present case that the challenged statute has a primary effect which advances religion. The Court would also be required to reject the challenge that the statute involves excessive government entanglement with religion. Were the Court to do so, it would necessarily overrule *Lemon* v. *Kurtzman* and *Earley* v. *DiCenso,* 403 U.S. 602 (1971). So long as these decisions stand, so too, we suggest, must stand the decision of the court below in the present case.

Conclusion

Appellees respectfully submit that the questions upon which this cause depends are so unsubstantial as not to need further argument, and appellees respectfully move the Court to dismiss these appeals or, in the alternative, to affirm the judgment entered in the cause by the United States District Court.

Respectfully submitted,

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December, 1976